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20 **UNITED STATES DISTRICT COURT**
 21
NORTHERN DISTRICT OF CALIFORNIA

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23 CHRIS CRIMI, on Behalf of Himself and All)
 24 Others Similarly Situated,)
 25)
 26 Plaintiff,)
 27 v.)
 28)
 29 EDWARD W. BARNHOLT, H. RAYMOND)
 30 BINGHAM, ROBERT T. BOND, RICHARD)
 31 J. ELKUS, JR., STEPHEN P. KAUFMAN,)
 32 KENNETH LEVY, MICHAEL E. MARKS,)
 33 DEAN O. MORTON, KENNETH L.)
 34 SCHROEDER, JON D. TOMPKINS,)
 35 RICHARD P. WALLACE, KLA-TENCOR)
 36 CORPORATION, and DOES 1 through 25,)
 37)
 38 Defendants.)
 39 _____)

40 CASE NO. C 08-2249 CRB

41 **CLASS ACTION**

42 **REPLY MEMORANDUM OF POINTS
 43 AND AUTHORITIES IN SUPPORT OF
 44 PLAINTIFF'S MOTION TO REMAND
 45 ACTION PURSUANT TO 28 U.S.C. §
 46 1447 FOR LACK OF SUBJECT
 47 MATTER JURISDICTION**

48 DATE: September 12, 2008
 49 TIME: 10:00 a.m.
 50 JUDGE: Hon. Charles R. Breyer
 51 CTRM: 8, 19th Floor

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1 Plaintiff Chris Crimi respectfully submits this Memorandum of Points and Authorities in
 2 support of his Motion to remand this action to the Santa Clara Superior Court.

3 **I. INTRODUCTION**

4 Plaintiff Crimi filed this action in the Santa Clara Superior Court. This Court should now
 5 remand this action back to the Santa Clara Superior Court because Defendant KLA-Tencor
 6 Corporation (“KLA” or the “Company”) cannot meet its burden of proof related to the removal of
 7 an action from state court to federal court based on subject matter jurisdiction. Indeed, as this Court
 8 has already ruled in an action alleging similar (but different) claims as alleged herein, “[b]ecause
 9 Plaintiff’s complaint falls within the ambit of an exception to SLUSA, Defendants’ motion [should
 10 be] DENIED and the action [should be] REMANDED to state court.” *Huang v. Reyes*, N.D. Cal.
 11 Case No. C 07-5950 CRB, at 2:1-3 (N.D. Cal. Mar. 6, 2008) (emphasis in original).

12 **II. BECAUSE THE DISTRICT COURT LACKS SUBJECT MATTER JURISDICTION,
 13 THIS CASE MUST BE REMANDED TO THE SANTA CLARA SUPERIOR COURT**

14 As stated in plaintiff’s opening papers, the general federal remand statute, 28 U.S.C. §
 15 1447(c), provides, in relevant part, that “[i]f at any time before final judgment it appears that the
 16 district court lacks subject matter jurisdiction, the case shall be remanded.” 28 U.S.C. § 1447(c).
 17 Further, SLUSA provides that if, in considering a challenge to the removal from state court under
 18 SLUSA’s provisions, the federal district court determines that an action is preserved under the
 19 Delaware carve-out, the federal court is *required* to remand the action back to state court. SLUSA
 20 specifically states that after an action has been removed, “if the Federal court determines that the
 21 action may be maintained in State court pursuant to this subsection, the Federal court *shall remand*
 22 such action to such State court.” 15 U.S.C. § 78bb(f)(3)(D) (emphasis added). Therefore, once this
 23 Court determines it does not have subject matter jurisdiction, it *must* remand the case back to the
 24 Santa Clara Superior Court.

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1 As more fully alleged in plaintiff's Memorandum of Points and Authorities in support of his
 2 Motion, Plaintiff's state law claims involve both:

3 (I) the purchase or sale of securities by the issuer or an affiliate of the issuer
 4 exclusively from or to holders of equity securities of the issuer; [and/]or

5 (II) any recommendation, position or other communication with respect to
 6 the sale of securities of an issuer that –

7 (aa) is made by or on behalf of the issuer or an affiliate of the
 8 issuer to holders of equity securities of the issuer; and

9 (bb) concerns decisions of such equity holders with respect to
 10 voting their securities, acting in response to a tender or
 11 exchange offer, or exercising dissenters' or appraisal rights.

12 15 U.S.C § 78bb(f)(3)(A)(ii). Accordingly, this Court must remand this action to the Santa Clara
 13 Superior Court. *See* 15 U.S.C. §17bb(f)(3)(D).¹

14 In its Opposition to Motion to Remand (the “Opposition” or “Opp.”), KLA is grasping at
 15 straws. First, in the Introduction section of the Opposition, defendant alleges that in his Second
 16 Amended Complaint (the “SAC”) plaintiff makes the same claims as he did in his first complaint
 17 which was dismissed with leave to amend. *See* Opp. at 1:18-19 (“Plaintiff uses the already rejected
 18 voting claims as a Trojan horse . . .”), 2:3-4 (“The state court has already found that his voting
 19 allegations are derivative . . .”).² Then, KLA alleges that “Plaintiff's reliance on *City of Ann Arbor*

20 ¹ SLUSA requires remand when a plaintiff's complaint satisfies either 15 U.S.C §
 21 78bb(f)(3)(A)(ii)(I) or 15 U.S.C § 78bb(f)(3)(A)(ii)(II). Satisfaction of both clauses is not
 22 necessary. *Id. See also Indiana Elect'l. Workers Pension Trust Fund, IBEW v. Millard*, 2007 U.S.
 Dist. LEXIS 54203, at *11 (S.D. N.Y. July 26, 2007) (The Court, finding that at argument the
 parties “focused on prong (II)” and that “prong (II) [was] dispositive,” also found that it was
 “unnecessary to reach prong (I)” before remanding.)

23 ² Contrary to defendant's intimations, there has been no holding by any court that plaintiff
 24 cannot plead his action as a direct action and must plead his action as a derivative action.
 Moreover, as recently recognized by the Delaware Chancery Court, “In *In re J.P. Morgan Chase &*
Co Shareholders Litigation, the [Delaware] Supreme Court began its analysis by recognizing that a
 25 claim for a breach of the duty of disclosure that ‘impaired the stockholder's right to cast an informed
 26 vote . . . is direct.’” *In re Transkaryotic Therapies, Inc.*, 2008 Del. Ch. LEXIS 76, 31-32 (Del. Ch.
 27 June 19, 2008). As a result, plaintiff believes his action is properly pled as a direct action and
 28 would survive any demurrer filed in state court or defendant's motion to dismiss filed in federal
 court. (However, because this action should be remanded, plaintiff contends that this court does not

1 *Employees' Retirement Sys. v. Gecht*, 2007 WL 780568 (N.D. Cal. 2007), and *Pace v. Bidzos*, 2007
 2 WL 2908283 (N.D. Cal. Oct. 3, 2007) is misplaced. [footnote omitted] These actions involved
 3 claims that were limited in scope, and did not seek to impose compensatory damages for 'holding'
 4 shares of a corporation." Opp. at 13:21-14:1. As a result of these two arguments, defendant's
 5 motion is internally contradictory. How can plaintiff's current claims be the same as the ones
 6 "already reject[ed]" by the state court but different from the claims in *Ann Arbor* and *Pace*, which
 7 were essentially the same, with minor differences, to the ones plaintiff Chris Crimi alleged against
 8 defendants herein in his initial state court complaint. The arguments, together, are absolutely
 9 nonsensical.

10 While plaintiff believes his currently pled claims are different claims which relate to the
 11 ones he initially alleged in state court and which were the subject of defendant's Demurrer, plaintiff
 12 also believes that prong "(I)" of the Delaware carve-out applies to this litigation because it
 13 "involves" the transfer of stock from KLA (the "issuer") to the Company's stock option plans
 14 ("holders of equity securities of the issuer"), and thereby to certain of the Company's directors,
 15 officers and employees (also "holders of equity securities of the issuer"). *See* 15 U.S.C.
 16 §78bb(f)(3)(A)(ii)(I). KLA's grant of options to purchase its equity securities to its directors,
 17 officers and employees was a "sale" of the underlying equity securities. *Falkowski v. Imation Corp.*,
 18 309 F.3d 1123, 1129-1130 (9th Cir. 2002). As a result, option holders are the holders of securities.
 19 Accordingly, contrary to defendant's assertion, when an option holder exercises his or her rights
 20 pursuant to the option, KLA, the issuer, sells securities exclusively to "holders of equity securities
 21 of the issuer." 15 U.S.C. §78bb(f)(3)(A)(ii)(I).

22 Prong "(II)" of the Delaware carve-out also applies to this litigation because plaintiff's SAC
 23 alleges that defendants breached their Delaware state law fiduciary duties by, *inter alia*,
 24 disseminating false and misleading proxy statements on October 6, 1997, September 28, 1998,
 25 October 15, 1999, October 6, 2000, September 28, 2001, September 20, 2002, September 23, 2003,
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27 need reach the merits of defendant's motion to dismiss because it should be denied on the grounds
 28 that the action should be remanded to state court. *See Huang v. Reyes*, N.D. Cal. Case No. C 07-
 5950 CRB (N.D. Cal. Mar. 6, 2008).)

1 September 9, 2004, October 13, 2005; and February 27, 2007, which, as more fully outlined in the
 2 SAC, requested KLA shareholders vote their shares in favor of proposals to dedicate millions of
 3 additional KLA shares to the Evergreen Provision,³ adopt the restated 1982 Stock Option Plan, and
 4 adopt the 2004 Equity Incentive Plan. ¶¶30-46, 71;⁴ *See also* 15 U.S.C. §78bb(f)(3)(A)(ii)(I);
 5 *Huang v. Reyes*, N.D. Cal. Case No. C 07-5950 CRB at 7:8-10 (Plaintiff's claims definitely "satisfy
 6 the second prong of the carve-out."). Indeed, as held by the *Indiana Elec'l* Court, "the alleged
 7 communications [to shareholders through proxy statements] were 'with respect to the sale of
 8 securities.'" *Indiana Elec'l.*, 2007 U.S. Dist. LEXIS 54203, at *12-13 and *21.⁵ Accordingly, as in
 9 this litigation, "the allegations in the Complaint meet every requirement to fall within prong (II) of
 10 the carve-out." *Id.*, 2007 U.S. Dist. LEXIS 54203, at *25.

11 Finally, contrary to defendant's assertion, the only complaint currently relevant to plaintiff's
 12 Motion for Remand and defendant's Motion to Dismiss is the SAC, which defendant stipulated to
 13 plaintiff filing. *See Crimi v. Barnholt, et al.*, Case No. CV-08-2249 CRB, Docket No. 33 (N.D. Cal.
 14 July 3, 2008). The fact that the complaint on file at the time defendant removed this action to
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16 ³ The Evergreen Provision was automatic annual share replenishment feature which
 17 provided for, on the first day of the next fiscal year, the addition to the Plan an amount of shares
 18 equal to 3% of KLA's outstanding shares of common stock on the last day of each fiscal year.

19 ⁴ All "¶" references are to plaintiff's SAC.

20 ⁵ *See also Ann Arbor*, 2007 U.S. Dist. LEXIS 21928:

21 Here, there is more than a "tangential relationship between
 22 Defendants' allegedly fraudulent communications to shareholders and
 23 the prospective sale of securities at issue (i.e. stock option grants). [fn
 24 omitted] *Falkowski*, 309 F.3d at 1130-31. The authorization sought
 25 by the allegedly misleading proxy statement has a "transaction nexus"
 26 with any further options grants. *In re Financial Corp. Of Am.*
 27 *Shareholder Litig.*, 796 F.2d at 1130. The shareholder authorization
 28 was necessary predicate to any further option grants of backdated
 options, options contemplated by the complaint. [fn omitted] The
 complaint fairly implies the purpose of the misleading proxy
 solicitation was to facilitate further backdated options. There is thus
 clear causal connection between the proxy statement and the
 anticipated transaction.

1 federal court contained an additional cause of action does not defeat plaintiff's motion for remand.
 2 That cause of action is no longer part of plaintiff's claims, and the Court should not consider a
 3 claim which has been voluntarily removed from the action. Any further argument related to that
 4 cause of action is moot, because it is no longer part of this case.

5 *In re Lord Abbett Mutual Funds Fee Litig.*, 463 F. Supp. 2d 505, 514 (D. N.J. 2006), cited
 6 by defendants, is not dispositive because, unlike in the *Lord Abbett* case, there has been no finding
 7 that any claim asserted by plaintiff is precluded by SLUSA. *Id.* Instead, prior to a hearing on
 8 KLA's motion to dismiss, because KLA violated this Court's Standing Order regarding the
 9 permissible length of a brief, defendant stipulated to plaintiff's filing the SAC, without reserving
 10 rights related to plaintiff's First Amended Complaint filed in state court. Instead, defendant only
 11 "reserve[d] all rights and arguments with respect to the Second Amended Complaint." *See Crimi v.*
 12 *Barnholt, et al.*, Case No. CV-08-2249 CRB, Docket No. 33 at 2:18 (N.D. Cal. July 3, 2008).
 13 Moreover, *Lord Abbett* is a District of New Jersey case which is not authority this Court must
 14 follow. Indeed, a recent a Judge in the Central District of California found the *Lord Abbett*
 15 reasoning "unpersuasive." *In re Am. Funds. Mut. Fee Litig.*, 2007 U.S. Dist. LEXIS 8276, at *19
 16 (C.D. Cal. Jan. 18, 2007) (holding that SLUSA does not require that a court dismiss entire actions
 17 because some claims were barred by SLUSA).

18 Again, pursuant 28 U.S.C. § 1447(c) "[i]f at any time before final judgment it appears that
 19 the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c)
 20 (emphasis added). Because the claims alleged by plaintiff in the SAC are exempt from the SLUSA
 21 preemption requirements pursuant to the Delaware carve-out clause, this action must be remanded
 22 to the Santa Clara Superior Court.

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III. CONCLUSION

For the foregoing reasons, plaintiff respectfully requests the Court remand this action to the Santa Clara Superior Court.

Dated: August 29, 2008

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By: _____ /s/
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